STANDARD CHARTERED BANK

v.

KONWAH ENTERPRISE SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
MOKHTAR SIDIN JC
[CIVIL SUIT NO. D3-23-1294-87]
12 MAY 1989

CIVIL PROCEDURE: *Summary judgment - Whether there are any triable issues - Burden on defendant to show sum claimed is incorrect.*

BANKING: *Whether bank owes duty in cases of sale by chargors of the land by private treaty.*

The plaintiff had granted the 1st defendant an overdraft facility secured by a charge over land owned by the 2nd and 3rd defendants and by a guarantee from the 2nd to 7th defendants.

The 2nd and 3rd defendants with the plaintiff's agreement had sold the land so charged for RM280,000 to repay part of the outstanding sum and the plaintiff taking into consideration the sale proceeds amended its statement of claim and obtained summary judgment for the balance.

On appeal brought by the 2nd to 6th defendants it was argued that:

(a) the amount claimed had not been proved by affidavit or certificate of indebtedness, and

(b) the plaintiff failed in its duty the care to the 4th to 6th defendants in failing to obtain the true market value of the land at the time of sale.

Held:

[1] After going through the evidence, the sale price of RM280,000 reflects the substantially fair market value of the land at the time of sale.

[2] The 2nd and 3rd defendants in negotiating the sale were not acting as agent of the plaintiff. The plaintiff is not responsible for their actions. The plaintiff also did not give any directions or interfere with the act of the defendants.

[3] The amount due was stated in one of the plaintiff's affidavit the defendants failed to adduce any evidence to show that the amount stated is wrong in order to raise a triable issue.

[Appeal dismissed with costs.]

Cases referred to:

Standard Chartered Bank v. Walker & Anor. [1982] 3 All ER 938
Development & Commercial Bank Bhd. v. Almas Motors Corporation (M) Sdn. Bhd. & Ors. [1988] 1 CLJ (Rep) 502

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 1
National Land Code 1965, ss. 253 to 269
Contracts Act 1950, s. 94

For the appellants/defendants 2-6 - K.Y. Chang; M/s. Chye, Chow, Chung & Co.
For the plaintiff/respondent - W.H. Tang; M/s. Arifin & Partners

JUDGMENT

Mokhtar Sidin JC:

This is an appeal by the 2nd, 3rd, 4th, 5th and 6th defendants against the decision of the Senior Assistant Registrar who had given judgment in favour of the plaintiff against them as well as the 1st defendant on the application by the plaintiff for summary judgment under O. 14 r. 1 of the Rules of the High Court 1980.

In the present appeal the plaintiff as banker had extended overdraft banking facilities to the 1st defendant, and these facilities, as is normal in banking practice, were secured by a first legal charge created over a piece of land ("the land") belonging to the 2nd and 3rd defendants, viz. land held under H.S. (D) 24364 P.T. No. 13718, Mukim of Petaling. In addition to that charge which had been duly registered, by a guarantee in writing dated 17 October 1985, the 2nd, 3rd, 4th, 5th, 6th and 7th defendants agreed with the plaintiff to guarantee the due payment on demand to the plaintiff of all money and liabilities owing or incurred by the 1st defendant on any current or other account or in any manner whatsoever with interest thereon with daily rests up to the limit of RM400,000. The plaintiff made demand on all the defendants for the repayment of the overdraft facilities given when the amount advanced including interest was approximately RM360,000. On 4 April 1987 the 2nd and 3rd defendants, as chargors of the land, informed the plaintiff that they proposed to sell the land by private treaty at the price of RM280,000 in order to repay part of the overdraft facilities advanced by the plaintiff and owing by the 1st defendant. The plaintiff agreed to the proposal and the sale was subsequently carried out and the sum of RM280,000 (the proceeds of the sale) was paid to the plaintiff accordingly to reduce the overdraft account of the 1st defendant. The claim by the plaintiff by its amended statement of claim was reduced accordingly after taking into consideration the payment of RM280,000. The Senior Assistant Registrar gave judgment in favour of the plaintiff for the sum claimed in the amended statement of claim.

Being dissatisfied with the decision of the learned Senior Assistant Registrar, the 2nd, 3rd, 4th, 5th and 6th defendants appealed to the Judge in chambers. On the hearing of the appeal, it was contended on behalf of the defendants that the decision of the learned Senior Assistant Registrar was wrong and should be set aside and the appeal allowed on the following grounds:

(a) Firstly, the amount claimed and stated to be owing by the defendants to the plaintiff had not been proved at all either by the affidavit filed or by any certificate of indebtedness; and

(b) Secondly, it was the contention of the 4th, 5th and 6th defendants that the plaintiff had failed to discharge the duty of care which they owed to them, i.e. the 4th, 5th and 6th defendants, to obtain the true market value of the land at the time when the plaintiff had agreed to the sale of the land by the chargors, i.e. the 2nd and 3rd defendants.

Let me deal first with the second ground. In support of this contention the defendants produced the valuation report prepared by Jurukon Hartanah Kuala Lumpur which concluded that the fair market value of the land is about RM340,000. This conclusion is arrived at by way of comparison of the sale of similar property within the same locality in the Mukim of Petaling as follows:

Date	Lot No.	Consideration
14 August 1985	P.T. 13728	RM317,900
16 June 1986	P.T. 13705	RM290,000
8 August 1986	P.T. 13708	RM305,000
23 December 1987	P.T. 13704	RM280,000

After going through that evidence and considering it carefully, I am of the opinion that the sale of the land at the price of RM280,000 reflects the fair, or substantially the fair market value of the land at the material times. It is pertinent to point out that the sale of the land was not at the initiative of the plaintiff. The sale was done by the 2nd and 3rd defendants who are the owners and chargors. It was the 2nd and 3rd defendants who negotiated with the third party for the sale and purchase of the land by private treaty, as opened to a sale by public auction under the provisions of ss. 253 to 269 of the National Land Code 1965. Only after the conclusion of such negotiation that the 2nd and 3rd defendants requested the plaintiff to release the land and discharge the charge on payment of RM280,000. The plaintiff acceded to this request. The 2nd and 3rd defendants as owners and chargors of the land did not complain about the sale. Learned Counsel for the defendants cited the judgment of Lord Denning in the case of *Standard Chartered Bank v. Walker & Anor.* [1982] 3 All ER 938 where the learned Judge said:

> ...The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company (of which he is the agent) to clear off as much of its indebtedness to the bank as possible, but also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. It may be that the receiver can choose the time of sale within a considerable margin, but he should, I think, exercise a reasonable degree of care about it. **The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realisation. If he does so, then it too is under a duty to use reasonable care towards the company and the guarantor.** (Emphasis mine)

With respect, I entirely agree with the statement of law in the above case which was cited with approval by V.C. George J in *Development & Commercial Bank Bhd. v. Almas Motors Corporation (M) Sdn. Bhd. & Ors.* [1988] 1 CLJ (Rep) 502. In my opinion, however, the *Standard Chartered Bank* case does not assist the defendants for that case can be easily distinguished from the present case in that the 2nd and 3rd defendants are not the agents of the plaintiff. Furthermore, as underlined, the plaintiff is not responsible for the act of the 2nd and 3rd defendants in the sale of the land; neither did the plaintiff give any direction or interfere with the act of those defendants. If at all the 2nd and 3rd defendants are treated to be agents, they are the agents for the other defendants. Thus the other defendants must take the responsibility of the acts of the 2nd and 3rd defendants. As such I am of the view that there is no merit on the contention of the defendants of this ground.

As to the first ground it was contended on behalf of the defendants that there were discrepancies in the affidavit of Ng Yin Hing affirmed on 7 December 1988. No figures were ever mentioned in that affidavit. The affidavit referred to the statement of claim which was subsequently amended to take into consideration the sum of RM280,000 which was paid by the 2nd and 3rd defendants to the plaintiff. The amount due and payable at the time hearing

of the O. 14 application before the learned Senior Assistant Registrar was as stated in the affidavit of Lim Jian Hoo affirmed on 14 July 1987. The defendants failed to adduce any evidence to show that the amount stated is wrong in order to raise a triable issue. It is only the allegation of the defendants that the value of the land was more than RM280,000 and thus the amount due and payable to the plaintiff should be much less. For the reasons I have stated above I am satisfied that the land was sold at RM280,000 and this sum had been taken into account by the plaintiff.

In passing learned Counsel the defendants submitted that s. 94 of the Contracts Act 1950 to be applicable in this case. In my view s. 94 is not applicable in this case for the simple reason that sale of the land was not carried out by the plaintiff but by the 2nd and 3rd defendants who are the owners and the chargors of the land.

Accordingly, I am of the view that there is no merit in the appeal of the 2nd to 6th defendants and that they did not raise any triable issue. As such I dismiss this appeal with costs.

Also found at [1989] 2 CLJ 488